93-726

No._____

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it not an error for the New York State Court of Appeals to decide that the order of the Appellate Division, First Department disbarring the applicant and removing his name from list of attorneys admitted to practice law in the State of New York, is not a final order from which an Appeal may heard by the Court of Appeals?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES CITED iv

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 19

INDEX OF APPENDICES

APPENDIX A

New York State Court of Appeals, Order A1

APPENDIX B

Article: "Informal Discipline in the First Department 1991 Update (Letters of Admonition)" New York Law Journal, October 19, 1992 . . . . . A4

APPENDIX C

Proceedings and order of Appellate Division. A7

APPENDIX D

Affidavits of Physicians. A36

APPENDIX E

Order of extension of time by Supreme Court of the United States. A40

APPENDIX F

Amendments VIII and XIV(1) to
United States Constitution A43

TABLE OF AUTHORITIES CITED

Cases	Page
Bates v. St. Bar of Arizona, 433 U.S. 350 [1977]	3
Erdman v. Stevens, 458 F 2d 1205, 1210 [1972]	3
Goldfarb v. Virginia St. Bar, 421 U.S. 773, 792 [1975]	3
Johnson v. Avery, 939 U.S. 544, 551 [1969]	3
Konigsberg v. Bd. of Examiners, 353 U.S. 252, 273 [1957]	3
Matter of Dondi, 63 NY2d 331, 482 NYS2d 431	4
Matter of Eldridge, 82 N.Y. 161 [1880]	4
Matter of Kimball, 33 NY2d 586	4
Matter of Levine, 101 AD 2d	15
Matter of Levy, 37 NY2d 279	4
Matter of Ming, 459 F 2d 1352 [1935]	3
Matter of Mitchell, 40 NY2d 153	4
Matter of Ruffalo, 390 U.S. 544, 550 [1967]	3
People v. Colebut, 86 Misc.2d 729, 735	12

People v. Collier,
72 NY2d 298 [1988] 11
People v. Infante,
Supra 89 . . . . . 11, 12
People v. Phipps,
170 AD2d 220 (1st Dept. [1989]) 12
Randal v. Brigham,
7 Wall. 523, 540 4

STATUTES

New York Code
Title 22, Section 605.22(c) . . . 4, 7, 8, 9, 11, 12, 13, 14
Title 22, Section 605.1(b) 9, 10, 12, 15
Title 22, Section 603.16(c)(1) 16
N.Y. Criminal Procedure Law
Section 190.25(1) 11, 12, 13
United States Constitution
Amendments VIII and XIV(1) A43

In The

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OMAR ZAKI GHOBASHY,

Petitioner

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner, Omar Z. Ghobashy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals which dismissed the Appeal on ground that order of Disbarment does not finally determine the proceeding within the meaning of the Constitution, and motion for leave to appeal is denied, and that said motion for a stay be and the same is dismissed as academic.

OPINIONS BELOW

The Court of Appeals of the State of New York did not determine the Appeal on the merits, it denied review on ground that the order of the Appellate Division of the Supreme Court, New York County, is not a final order and therefore, it is not appealable.

JURISDICTION

This is an application for a writ of certiorari from Order of the Court of Appeals of the State of New York which dismissed the leave to Appeal from Order of Appellate Division of the Supreme Court, New York County, on ground that the order appealed from is not a final order (July 9, 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII and Amendment XIV(1) to the United States Constitution is set forth in Appendix H.

STATEMENT OF THE CASE

Chief Justice of the Appellate Division, First Judicial Department and the Chief of Panel in Disciplinary Proceeding in the Disbarment of this lawyer should have been disqualified.

Justice Murphy, the Chief Justice of the Appellate Division, First Department should have disqualified himself of deciding a case on Appeal from recommendations of the Disciplinary Committee that he selected. The Chief Judge will not disaffirm a Committee that he selected. There were prior disputes between the Disciplinary Committee and Chief Justice which resulted in the dismissal of the Chief of Disciplinary Committee.

The Chief of Disciplinary Committee is a resident of Westchester County, and should not have been selected as he is not a resident of New York County. As a Juror, he is not a resident of the county in which he determines the action. Many residents of New York County of minorities are excluded and not selected as Judges and non-judges by Justice Murphy. Only one sector of the population constitutes almost the entire Committee. It is believed that non of the members of the Disciplinary Committee is of Black, Latin American, Middle Eastern nor American Indians, attorneys and

non-attorneys who are residents of New York County. The method of selection of members of the Disciplinary Committee is not disclosed.

Thus, the composition of the Appellate Division Court that decides the Appeal, as composed of the Chief Justice, who appoints the Disciplinary Committee, must result in the disqualification of the Chief Justice from ruling on an Appeal from decision by the Disciplinary Committee.

The Court of Appeals of the State of New York erroneously decided that the this order is not final. Nothing remains to be done in this order. No explanation was given by the Court as to why the order of the Appellate Division is not a final order from which an Appeal is to be taken. No further order is required or expected, and the case was denied twice; once on Permission to Appeal submitted to Appellate Division by my lawyer Fredrick Lewis, Esq, and the second by Leave to Appeal to the State of New York Court of Appeals by my lawyer Nicholas Cooper, Esq. (See Appendix C.)

REASONS FOR GRANTING THE WRIT

Recognized principles of due process of law mandate that applicant be afforded a full and fair hearing. This Court has held that although the states have a compelling interest in regulation of the practice of law *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 [1975]; that power may not be exercised in an arbitrary or discriminatory manner *Konigsberg v. Bd. of Examiners*, 353 U.S. 252, 273 [1957], nor may it be exercised so as to abrogate federally protected rights *Bates v. St. Bar of Arizona*, 433 U.S. 350 [1977]; *Johnson v. Avery*, 939 U.S. 544, 551 [1969]; *see also*: *Erdmann v. Stevens*, 458 F. 2d 1205, 1210 [1972]; *Matter of Ming*, 459 F.2d 1352 [1935]. One of these "Federally protected rights" is an attorney's right to procedural due process in a disciplinary proceeding *Matter of Ruffalo*, 390 U.S. 544, 550 [1967]. In *Ruffalo*, the United States Supreme Court recognized that procedural due

process "includes fair notice of the charge ... and opportunity afforded [to] him for explanation and defense" *supra*, citing in part *Randall v. Brigham*, 7 Wall. 523, 540.

The State of New York Court of Appeals has long recognized that members of the bar cannot be deprived of the right to practice law without due process *Matter of Eldridge*, 82 N.Y. 161 [1880]; *see also*: *Matter of Kimball*, 33 NY2d 586. In *Matter of Mitchell*, 40 NY2d 153, the State of New York Court of Appeals stated that "the starting point for a discussion of appellant's due process claim must be the well-accepted rule that 'the requirements of procedural due process must be met before the State can exclude a person from practicing law'" (*supra* at 156); *see also*: *Matter of Levy*, 37 NY2d 279, in which it was recognized that an attorney must be assured of "full due process and fairness in recognition of the substantial interest that this is his in his right to practice law" (*supra* at 272).

In its 1984 decision in *Matter of Dondi*, 63 NY2d 331, 482 NYS2d 431, the State of New York Court of Appeals reaffirmed its long-standing recognition of the due process rights of attorneys in disciplinary proceedings (*supra* at 435). In *Dondi*, the Court dismissed disciplinary proceedings finding that the improper unsealing of criminal court records constituted a violation of the attorney's right to due process and was sufficient to justify a dismissal of the complaint due to the facts and circumstances of that case.

In *Dondi* the attorneys are entitled to fundamental fairness as a matter of due process of law in the prosecution of disciplinary proceedings against them. A review of the record herein demonstrates that the Respondent has been denied that fundamental fairness and thus has been deprived of due process by reason of the actions of the Hearing Panel, namely its clear violation of substantial procedural rules governing the conduct of hearings, namely 22 NYCRR 605.22(c).

If it is accepted, as the Appellate Division has found, that the Appellant waived his right to object to the violation of the quorum rule, by reason of the failure of his then attorney to raise a timely objection, then it is obvious that the Respondent has been deprived of due process of law by reason of the ineffective assistance of his then counsel. To permit Appellant's disbarment to stand when the result may clearly have been otherwise solely by reason of the failure of his attorney to raise a timely objection, is grossly, unfair and a clear deprivation of his procedural due process rights.

The decision of the Disciplinary Committee to disbar Appellant is excessive, discriminatory, unprecedented and contrary to Disciplinary Rules in New York, see article attached as Appendix B. The Decision was based on actions by the lawyer to inform the United States Immigration Service, in which cases were pending, of issues that must be disclosed in the petitions and supplements. The Attorney for Disciplinary Committee recommended cases that set up punishment not exceeding six months suspension of the attorney. In breach to the United States Constitution, Amendment VIII, disbarment is excessive, cruel and unusual punishment. The lawyer has the right to face his accusers and the deliberate acts of the Prosecutor to prevent the appearance of complainants to cross examine them in the hearing is a reversible error. Complainants or persons whose cases were heard by the Disciplinary Committee were purposefully prevented by the Prosecutor from appearing at the hearing to shield them from crimes committed under U.S. Immigration Laws. Notice of persons to appear in their cases was served on the eve of the trial, affording no time for Appellant to subpoena them.

a) **The case of Kahwaji:** A Syrian who applied for Political Asylum, and who was requested to file his Order to Show Cause by the U.S. Immigration to lawyer, when we applied Legalization for him. A procedure which was explained to Trial Court, but was not understood due to unfamiliarity of Panel of Immigration procedures.

Immigration Judge, Francis Lyons, appeared for Appellant, but was rushed out of Court and not questioned on these issues. Judge Lyons was interrupted and not afforded time to complete his answers as the information provided contradicted the Panel and did not support them .

Kahwaji and his wife did not appear as they are divorced and had never resided together. Affidavits submitted in the effect that Kahwaji never resided with his wife were concealed by Prosecutor. Prosecutor brought an Immigration Officer to testify on this case, which violates U.S. Immigration Law, that prohibits the appearance of U.S. Immigration officials in a State Court. Further violation was made when the Immigration officer appeared without the Immigration file of complainant, only to testify from memory. This Immigration officer, Mr. Blackman appeared without the permission and without the knowledge of the District Director. My then attorney, Mr. Beirvliet, was unable to handle the appearance of Blackman in an adequate way. The appearance of Blackman was to convene his personal desire to retaliate from Appellant for actions brought to U.S. Courts for his misconduct. The whereabouts of complainants were only known to Prosecutor. Prosecutor submitted divorce judgment of Kahwaji without disclosing how she obtained it. Prosecutor insisted to charge Appellant of not filing I-130 by Kahwaji's wife. The attorney's check that made the payment of the filing fee by Appellant was ignored and concealed by Prosecutor. The Immigration officer who testified without the file stated that I-130 was not filed. This could not be verified without the presence of the file.

This attorney was charged with Disciplinary misconduct when he was following the instructions of U.S. Immigration Service as to applications of the then new law of Legalization.

b) **The case of Al-Omari:** This is a case where there was no complainant and Mrs. Al-Omari did not appear at trial. Action in this case was started by Prosecutor herself. It is unlawful to have

brought to trial the new lawyer who was substituted by Order of the Surrogate Court. Appellant was denied his right to confront the witness. Mrs. Al-Omari was subject of criminal investigation in U.S. Immigration and the Yemeni government. Mrs. Al-Omari has disconnected her telephone and left the United States as I was informed by the insurance company.

c) **The case of the Gallardos:** I was denied confrontation of witness as Mr. Galardo did not appear. Appellant had considerable dealing with him and a relationship of good terms. The Gallardos did not disclose that they had any children from this marriage, while the papers submitted by the new lawyer disclose one child of the marriage. The absence of the husband at my trial is unexplained and denies me the right to confront him with his wife's accusations.

Accusations to Appellant that he did not return documents belonging to clients is untrue. All documents were returned to clients as soon as they were approved by the Immigration Service. Had these complainants not been concealed by Prosecutor, it would have developed at trial that they committed fraud on INS.

The Hearing Panel's violation of substantial procedural Disciplinary Rule, namely 22 NYCRR 605.22(c) denied Appellant procedural due process of law. The rules and procedures of the Departmental Disciplinary Committee for the First Department have been promulgated in 605 of the Rules of the Appellate Division. Section 605.22(c), dealing with quorum requirements during disciplinary hearings, states in part as follows:

> All matters presented to a hearing panel shall be determined by three members of the panel. Two panel members assigned to a matter shall constitute a quorum for the transaction of business. All actions shall require the concurrence of at least two members. At least two members of a hearing panel assigned to a matter shall have heard the entire proceeding. The

> third assigned member either shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard.

22 NYCRR Section 605.22(c) can be divided into two very distinct parts, both requirements of which be completely satisfied for the hearing to comply with the mandate of this section.

The first part requires that at least three members of the hearing panel assigned to the matter shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard. The second part requires that at lease two members of the hearing panel assigned to the matter shall have read the entire proceeding before the hearing panel.

Here, four members were originally assigned to serve on the Hearing Panel of the DDC, namely: Sheldon H. Elsen, Esq., John M. Delehanty, Esq., Prof. Beatrice S. Frank and Susan Welsher. John M. Delehanty, Esq. never took part in the hearings or in the findings of the Panel. Therefore, Mr. Elsen, Prof. Frank and Ms. Welsher were the only members of the panel to actually serve.

In order to fulfill the first part of 22 NYCRR Section 605.22(c), Mr. Elsen, Prof. Frank and Ms. Welsher all must have heard the entire proceeding before the Hearing Panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard.

It is not disputed that Shelden H. Elsen, Esq., as the Hearing Panel Chair, heard the entire proceeding. Prof. Frank was present at the opening of each session of the hearing, but she left halfway through the first session on April 20, 1992. Prof Frank missed a portion of Appellant's direct and cross examination, although it was stated on page 3 of the transcript that Prof. Frank intended to read the transcript of whatever part of the hearing she missed. Therefore, it

can be assumed that Prof. Frank did just that and therefore fulfilled the initial requirement.

Susan Welsher was present at the opening of each session of the hearing, but she left during the second session on April 27, 1992, and was absent during the testimony of Ivan L. Van Leer concerning the Al-Omari matter. On page 346, line 24 to page 347, line 3 of the transcript, which was during the third session of the hearings on May 11, 1992, Ms. Welsher stated:

> I have no Al-Omari papers at all. If you remember, I left early last—I only have 36 which you distributed today.

The court should note that during Van Leer's testimony, 20 Staff exhibits were received in evidence. There is no indication in the record that Ms. Welsher read the transcript of Mr. Van Leer's testimony, in which case the requirement of the first part of 22 NYCRR 605.22(c) was not met. Thus, if Ms. Welsher failed to read the transcript of the testimony which she was not present for, then the hearing was defective since it violated the 22 NYCRR 605.22(c) requirements.

However, even if it can be shown that Ms. Welsher did read the transcript, the requirements of the second part of 22 NYCRR 605.22(c), which requires that at least two members of the hearing panel assigned to the matter shall have heard the entire proceeding before the hearing panel, must also be fulfilled.

As was previously stated, there is no dispute that Shelden H. Elsen, Esq., as a Hearing Panel Chair, heard the entire proceeding. Moreover, Prof. Frank was present for all three sessions of the hearing, although she left halfway through the first sessions on April 20, 1992. In the Appellate Division's per curiam decision it was held that since Appellant did not object or otherwise raise the quorum issue when this happened, pursuant to 22 NYCRR 605.1(b), it must be disregarded as a nonprejudicial irregularity in

procedure. However, at the time Prof. Frank left, there was no reason to object since both Mr. Elsen and Ms. Welsher were still sitting for the session.

As Mr. Elsen, Hearing Panel Chair, explained on page 3, lines 4 to 19 of the transcript:

The rules of this Disciplinary Committee are that we may proceed with a panel of two.

Mr. Delehanty is on trial and professor Frank will be here for half the session, but then Ms. Welsher and I will continue and we will constitute a quorum. The rules also are that other members of the Panel may join us on condition that they read the transcript which Professor Frank and Mr. Delehanty propose to do.

If Mr. Delehanty's trial keeps him out too long, I don't know if he will continue with this, but Professor Frank definitely intends to stay with this through the balance of the hearing.

Thus, there was no reason for Appellant to object at the time Professor Frank left the first session.

First of all, Appellant did not object at the time of Ms. Welsher's departure because he was following the guidelines laid out to him at the start of the first session by Mr. Elsen, the Hearing Panel Chair, at page 3, lines 4 to 6 of the transcript:

The rules of this Disciplinary Committee are that we may proceed with a panel of two.

Since Mr. Elsen and Prof. Frank were still present for the rest of the second session, it was Appellant's belief that there was no reason to object to Ms. Welsher's departure.

Furthermore, 22 NYCRR 605.1(b) states in pertinent part:

The Committee will not hold action of a Hearing Panel invalid by reason of any *nonprejudicial* irregularity. Any error, defect,

irregularity or variance, which does not affect *substantial rights* shall be disregarded (emphasis added).

In the present case, the procedural irregularities of the Hearing Panel have, in fact, affected Appellant's right to due process and so these irregularities are prejudicial and should not be disregarded.[1]

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[1] The two-pronged test of 22 NYCRR 605.22(c) is similar to that of New York Criminal Procedure Law 190.25(1), which governs the general proceedings and operation of the Grand Jury.

CPL 190.25(1) states:
Proceedings of the grand jury are not valid until at least 16 of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least 12 members thereof.

The Court also held that the Grand Jury is privileged to return an indictment so long as at least 12 of the grand jurors who voted to indict heard all the essential and critical evidence. See also *People v. Collier*, 72 NY2d 298 (1988).

In the present case, the first prong of 22 NYCRR 605.22(c) requiring a panel of at least three members of the hearing panel to have heard or read all of the proceedings, can be compared to the provision in CPL 109.25(1), which requires that at least sixteen grand jurors be present during a grand jury proceeding in order to furnish reasonable protection against malicious and unfounded prosecutions and yet create a Grand Jury small enough to permit to perform its duties efficiently, *People v. Infante*, supra 89.

The 22 NYCRR 605.22(c) requirement has the same effect by requiring at lease three people so that it may furnish reasonable protection against malicious and unfounded disciplinary sanctions and yet create a Hearing Panel small enough to permit it to perform its duties efficiently.

Furthermore, even if the first prong is satisfied, the second prong of 22 NYCRR 605.22(c) requiring at lease two members of the hearing panel to have been present for and have heard the entire proceedings can be compared with the provision in CPL 190.25(1), which requires that at least twelve grand jurors have

In the present case, Appellant is respectfully requesting an order granting him leave to appeal to the United States Supreme Court from the order affirming the Report and Recommendations of Hearing Panel whose procedures violated 22 NYCRR 605.22(c), a rule promulgated "to reach a just and proper determination of matters brought to the attention of the Office of Chief Counsel or the Committee," as stated in 22 NYCRR 605.1(b).

Sheldon H. Elsen, Esq., Hearing Panel Chair, summed up the entire hearing panel proceeding as follows on page 503, lines 10 to 15 of the transcript:

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heard all the essential and critical evidence in order to be eligible to vote whether or not to indict someone.

The court in *People v. Infante*, supra at 88-89 stated, "the Grand Jury must be instructed that 'those grand jurors, who join in an indictment must have been present and must have heard the essential and critical evidence' in those cases 'where the presentation to the Grand Jury is continued beyond one day and the composition of the panel may, therefore, vary on succeeding days,'" quoting from *People v. Colebut*, 86 Misc.2d 729, 735.

In the present case, the second prong of 22 NYCRR 605.22(c) requires that "[a]t least two members of a hearing panel assigned to a matter shall have heard the entire proceeding." There is no dispute that this requirement was not met satisfied by Hearing panel. Although Sheldon H. Elsen, Esq., heard the entire proceeding, both Professor Beatrice S. Frank and Susan Welsher were not present for certain parts of the proceeding, and John M. Delehanty, Esq., never attended any part of the proceeding. Thus, only one member of the Hearing Panel assigned to Appellant's matter heard the entire proceeding, thereby violating the second prong of NYCRR 605.22(c).

The present case is similar to *People v. Phipps*, 170 AD2d 220 (1st Dept. 1989) in which the court "determined that there was a question as to whether the vote (to indict defendant) was taken of al least 12 grand jurors who have heard all of the essential testimony" and so the indictment was dismissed and the case remanded to permit the People to establish full compliance with CPL 190.25(1).

> I must tell you, the Panel is, the duty devolves on us and on the Court in a proceeding of this nature to do two things: One is to protect the public, that is our primary duty. The other is to be fair to the lawyer.

The question of law sought to be brought up for review could be formulated as follow:

If a Hearing Panel, assigned by Departmental Disciplinary Committee of the First Judicial Department to conduct hearings into formal charges of attorney misconduct and to make such determinations and to impose such disciplinary sanctions as it may deem appropriate, violates 22 NYCRR 605.22(c), which requires at least two members of a hearing panel assigned to a matter have had heard the entire proceeding, does it violate the due process rights of the attorney who is before the Hearing Panel, just as a grand jury violates a defendant's due process rights if it does not comply with Criminal Procedure Law 190.25(1), which requires at least twelve members of a grand jury to have heard all the essential and critical evidence before they may be allowed to vote whether or not to indict the defendant?

An attorney's due process rights have been violated if the Panel of the Departmental Disciplinary Committee hearing his alleged misconduct violates rules and procedures promulgated to reach a just and proper determination of the matter. Here, Appellant has consistently shown that 22 NYCRR 605.22(c) was violated since at least two members of the Hearing Panel did not hear the entire proceedings thereby denying his right to a fair hearing and his right to due process.

The Appellate Division, in accepting the ruling that a substantial right of trial by a panel composed of one lawyer and two non-lawyers, which is similar to a Jury Trial, is valid in the the absence of one member of the Panel. If a Jury is absent, would a hearing before a Court in criminal trial be valid? In the trial of the

World Trade Center in U.S. District Court, Southern District of New York, the hearing was suspended when one juror was absent.

It is error to rule that the right of trial as provided by law is waived if no objection is made to the lack of quorum. This is a substantial right which cannot be waived. It renders the hearing invalid.

Appellant has been denied the effective assistance of counsel by reason of his hearing attorney's failure to raise a timely objection to the Panel's violation of the quorum rules; introduce evidence of Appellant medical disability and move for his suspension based thereon and to introduce evidence in mitigation available to him.

A review of the record discloses that Appellant's hearing attorney committed several errors which seriously prejudiced him and denied him of the effective assistance of counsel in his disciplinary proceeding.

The failure to raise a timely objection to the Panel's violation of quorum rules. As previously addressed, the Hearing Panel clearly violated the Appellate Division rules regarding the quorum requirements. While the Appellant has argued herein that his attorney did not object to the Panel's violation of the quorum requirements during the course of hearings in which they occurred, the Appellate Division nevertheless found in effect that the Appellant waived his right to raise the violation of the quorum rule by reason of his attorney's failure to make a timely objection:

We reject respondent's claim that the report should be disaffirmed because of non-compliance with Section 605.22(c) of the Court's rules relating to a quorum. No objection was taken. Nor was the issue raised when either of the Panel members left the room.

(See Exhibit C, Decision of the Appellate Division at page 6.)

If the Appellate Division is correct that the failure of his hearing attorney to raise objection to the quorum violation precludes his argument of that point, then clearly his attorney committed an error

which can only be characterized of having deprived him of the effective assistance of counsel.

Moreover, the Appellate Division opinion attempts to characterize this issue as *de minimus*. The court noted in its decision that the Panel's findings should not be invalidated by this irregularity, citing 22 NYCRR 605.1(b), which permits a finding to stand where any irregularity is "non-prejudicial" and one which "does not affect substantial rights ."

It is obvious that the violation of the quorum rule by the Hearing Panel did cause a substantial prejudice to the Appellant and as such substantially affected his right to a full and fair hearing pursuant to the requirements of due process. The quorum rules were set up to assure that the majority of the Panel were fully aware of the extent of the evidence and arguments, thus a violation of those rules effectively denies the Appellant a fair hearing.

If Appellant was precluded from raising the quorum violation by the Appellate Division, and absent that argument, the result is that he has been disbarred, then clearly he has been prejudiced by reason of his counsel's failure to raise that objection.

Failure to introduce medical evidence and move for Appellant disability suspension. The evidence available at the time of the hearing to Appellant's then attorney amply established that the he had been suffering from medical disabilities for many years and that his condition was then such as to render him incapable of assisting in his own defense. However, Appellant's attorney failed to introduce at the hearing any competent medical evidence tending to establish the extent of Appellant's medical disability, of which counsel was aware, either as a factor in mitigation of the charges — it is well established that physical disability casually related to the misconduct will be considered as a mitigation factor (*Matter of Levine*, 101 AD 2d) — or as the basis for a motion for Appellant's medical suspension upon the grounds that his condition "makes it

impossible for the the Appellant adequately to defend himself ..." [22 NYCRR 603.16(c)(1)].[2]

Indeed counsel to the Petitioner Committee was well aware of the extent of the Appellant's medical disability as early as May 1991, when the Appellant appeared before Prosecutor and submitted to depositions concerning pending complaints.

MS. EDELSTEIN: Well let me address the health issue.

Mr. Ghobashy did come to an EBT. He did submit testimony as to his medical condition. He may still have a serious medical condition. I trust he does have a severe medical condition.

Further, upon information and belief, Staff Counsel directly advised Appellant's hearing attorney of the his right to seek a medical suspension, at or about the time of the hearings. Indeed, in its report to the Appellate Division, the Hearing Panel commented specifically on the Appellant's instability at the time that he testified before the Panel:

> Respondent's lengthy testimony before the Hearing Panel was rambling and often incoherent...[3]

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[2] Section 603.16 specifically provides a procedure for determining whether a respondent is incapacitated by reason of a physical or mental disability from defending himself in disciplinary proceedings or continuing to engage in the practice of law. A petition under this section may be made either by the Disciplinary Committee, which may result in an independent examination of the Respondent, or by the respondent himself. If it is determined that the respondent suffers from such a disability, he shall be suspended indefinitely based thereon.

[3] As a result of the information provided to Staff Counsel and the conclusion drawn by the Hearing Panel itself, namely that Respondent was suffering from a severe medical disability, it would appear that counsel should have undertaken to bring on a proceeding under 603.16 to determine Respondent's capacity.

On the occasion of the motions in the Appellate Division with regard to the Hearing Panel's report, Appellant's appellate attorney introduced for the first time evidence of his medical disability, namely affidavits of his physicians, Michael Eufemio and Leonard Dire (those affidavits are annexed as Exhibit D. Dr. Eufemio stated that Appellant had been a diabetic for some ten years and had been under his care for two and one half years. The physician noted that the Appellant's blood sugar levels were extremely high and as a result in February 1992, he was admitted to New Rochelle Hospital. Further, the doctor stated that that condition, namely high blood sugar level, "can be a cause of negative psychological responses. ....In my opinion, Mr. Ghobashy's high blood sugar may have contributed to his behavior."

The affidavits further established that the Appellant suffered a myocardial infraction which was complicated by congestive heart failure on or about June 12, 1992, for which he was hospitalized for a period of two weeks. Though not specifically stated in the medical report, it would certainly seem apparent that the heart attack suffered by Appellant on June 12 was in part as a result of his long-standing diabetic condition, a condition which Dr. Eufemio stated "produces mood changes and feelings of irritability, anxiety, depression, and changes in personality and conduct".

Clearly Appellant has been severely prejudiced by the failure of his hearing attorney to put his medical condition in issue for the purpose of establishing that condition as a factor in mitigation of the charges and as a basis upon which to establish that Respondent was incapable of adequately defending himself against the charges.

The failure to offer substantial evidence in mitigation. The Hearing Panel, in its report to the Appellate Division, found specifically that "no persuasive evidence was offered in mitigation .." on Appellant's behalf, a factor which no doubt was critical in the Panel's determination to recommend that Appellant be disbarred.

In fact, substantial evidence in mitigation was known to and available to Appellant hearing counsel, namely as follows:

Although Appellant's counsel offered testimony of two character witnesses, one of whom was the Appellant's daughter, he failed to introduce any other evidence tending to mitigate the charges. Such evidence was available, through the testimony of Appellant himself with any supporting documentation which would be deemed appropriate, as follows:

The Appellant had served as a foreign service officer and member of the Egyptian delegation to the United Nations and the United Arab Republic Consulate General in New York. He was the author of over 29 articles and books on international law and foreign affairs, both in English and Arabic. He had lectured the Green Berets at East Carolina College at Fort Braff in 1965 on Middle East affairs and served as a consultant on international law and United States affairs. Further, he successfully represented the six-nation Iroquois Indians in New York, Canada and represented their interests in both Washington, and Albany, which was done on a pro bono basis.

Following the Appellant's arrival in this country in 1949, he received a Master of Arts degree from Columbia University and subsequently (1955) was the recipient of a Ph.D. degree in international law from New York University (his law degree was from Brooklyn Law School). Furthermore, in December 1991, the Appellant was invited to serve as a judge of International Eastern Regional Moot Court Competition.

Had this evidence in mitigation been offered and received, it is more than likely that the end result, namely Appellant's disbarment, would have been otherwise, either as a result of a lesser sanction or as a result of a finding of medical disability. Appellant's counsel failed to introduce this evidence is clearly indicative of his ineffectiveness on Appellant's behalf.

At time when Appellant was confined to hospital with a heart attack, and being the time to submit an appeal, Appellant was not able to assist in his defense, as he was informed by Fredrick Lewis, Esq., appeal attorney, that Staff Counsel refuses to consent to an adjournment.

WHEREFORE, Chief Justice Murphy of the Appellate Division, First Department cannot decide a case involving Disciplinary Panel that he appoints.

It was error for New York State Court of Appeals to decide to decline a review on ground that order of the Appellate Division is not a final order when this Court has consistently ruled otherwise.

The Prosecutor concealed the appearance of complainants and thus denied Appellant the right to cross examine them.

The absence of members of the Disciplinary Panel renders the hearing invalid and it is error for the Appellate Division to state that it can be waived.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the New York State Court of Appeals in this matter.

Dated: November 1, 1993.

Respectfully submitted,

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